

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1402

To be argued by
JAY GOLDBERG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1402

UNITED STATES OF AMERICA,

Appellee,

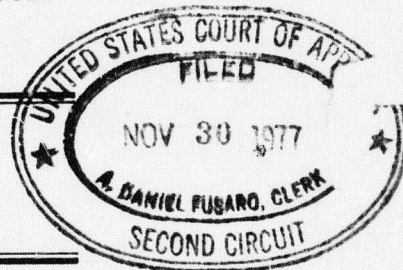
—v.—

MARION KNUCKLES,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

- against -

MARION KNUCKLES, et al.

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Appellant Marion Knuckles' Brief

Statement

This is an appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York on September 12, 1977 by the Hon. Charles Haight, Jr., following appellant's conviction before a jury of two counts of an indictment charging: (1) a conspiracy from August 1976 to distribute and possess with intent to distribute narcotic drugs and (2) a substantive count charging distribution and possession with intent to distribute one kind of drug, to wit, heroin on October 1, 1976. Appellant was sentenced on September 12th, 1977 to eight years on the conspiracy count and four years on the substantive count, these to be served consecutively. He is presently serving his sentence.

The Facts

Introduction

We proceed to outline the facts in this case with a transcript of over 1,200 hundred pages. Only a small portion of it however, deals with the crimes charged in the indictment. The bulk of it concerns "prior similar act proof".

Before trial, counsel for the government advised that: "...the Government intends to offer prior similar act proof relating to the (1) narcotics activities of Marion Knuckles, Raymond Brown and others during late 1975 and early 1976 in the 116th 8th Avenue area of New York City; (2) narcotic activity of Marion Knuckles and Jane Doe, a/k/a Gwen (referred to herein as Marion Gwendolyn Owens) during the spring, 1975 and (3) narcotic activity of Marion Knuckles, Yolanda Valdez Simpson and others during the summer 1975 and early 1976". Over repeated objection, government counsel was permitted to prove these other acts and offer documentary evidence in support thereof. The facts concerning the indictment paled to insignificance in light of the avalanche of "prior similar act proof" offered on the government's direct case without any showing of need.

The testimony

Yolanda Valdez Simpson, a former co-defendant who had

pleaded guilty, was the sole substantive government witness to the events covered by the indictment.

In 1974 she met appellant at 116th Street and 8th Avenue. It was in 1975 that she told him she needed money (57)*. He responded shortly thereafter in 1975 by taking her to an apartment at 79th Street where three other people were present (58).

Once in the apartment, appellant went to the back and brought out some boxes and bags and put them on the table. In the boxes were glassine bags, tape, cutting material and heroin (59). The heroin was cut and bagged (65). She was paid \$1,000 (66). Thereafter, she had another narcotic encounter with appellant. He paid her \$300 a week to hold some bags for him and then distribute them for him (67). This she fixed as having taken place in the summer of 1975 (68).

In mid 1976 she again worked at a narcotic mill for appellant (69-70). The details of that operation were set forth as well as appellant's displeasure with the quality of the bagging (70-74).

At page 76 the prosecutor first reached "the govern-

* References bearing no prefix are to the Transcript. Those with "A" refer to the Appendix.

ment's proof on this indictment". (A 22) The testimony relating to this indictment ran from page 90 to page 148.

(A 23-81)

In late August 1976, Ms. Simpson told appellant she needed money. Appellant had her meet him and defendants Raymond Brown and Rose Smith in an apartment at Amsterdam Avenue. A bagging operation occurred. Weeks later she spoke with appellant and arranged to work for him, this time using her own apartment at 626 Riverside Drive as the mill. (96) On the evening in question she observed Gwen Owens, Raymond Brown and appellant coming out with boxes and bags at an apartment at 95th Street and 5th Avenue. The material was placed in a car and it was taken to her apartment (100). After it was dropped off, everyone left and went to a bar where she was told to wait for appellant. When he did not show, she went home (101). The following day she met appellant who told her that he wanted her to meet him later that night at the apartment at 95th Street and 5th Avenue (102). While there, appellant went in the back and came out with a shopping bag and they drove to her apartment (104). The cutting, straining, spooning and packaging took place with the assistance of Rose Smith and Raymond Brown (105-111). After hours of work the mission was completed.

Several thousand bags were packaged. Appellant took some with him when he left and she was told to bring a portion the next day and give it to someone at the bar (119).

The time was fixed at October 4, 1976. Hours after she performed the work required of her, she spoke with Raymond Brown and Rose Smith and it appeared appellant had not paid anyone for their work. Days later she told appellant she needed money and he gave her \$500 (122). Several hours later she confronted appellant and told him the money he gave her was insufficient (129). They got into a physical fight, she retreated to her car, secured a gun, thought the better of it, and drove off (130-131).

She was arrested in March 1977 and her guilty plea to the conspiracy count was developed as was the full extent of her written agreement with the government (145-7). Before concluding direct, government counsel again brought out her guilty plea to the first count of the case at bar (148). No cautionary instruction was given as to the limited evidentiary effect of her guilty plea.

Prior to taking the witness on cross, the Court fully explained to the jury the purpose and set forth the language of 18 USC 3500 (154). There was absolutely no justification

for this in light of the early defense request as follows:

"Counsel: Would you also consider not having it turned over (the 3500 material) in the presence of the jury?

The Court: Oh, yes.

"Counsel: It may be it will not have a value and I wouldn't want the jury to see that the matter is given to us by the government.

The Court: Well, I think that's right...."

(29 - 30)

Aside from the Court's error at p. 154, it was repeated at p. 461.

The cross examination of Simpson was concerned with her motive to seek favor from the government and her possible bias against appellant for his having rebuffed a claimed sexual advance Ms. Simpson made upon his wife (176). Also her lack of credibility was sought to be demonstrated by reason of her prior conflicts with the law.

Cross examination developed that during the October work session some of the defendants sniffed cocaine as they worked. (199). (A 83) It was clear though that the conspiracy charged in the indictment, as the prosecutor saw it, was one to pack

age and distribute heroin (21, 22, 24). (A 18, 19, 21) As far as cocaine was concerned, it was not clear who brought it to the apartment, the amount available (198) (A 82) or if those who used it brought their own supply. One thing remained clear throughout the entire trial and that was that there was no cutting or possession of cocaine with intent to distribute. To be sure, possession of an undisclosed amount of cocaine for one's own personal use would carry a far lighter sentence on conviction than heroin and such a violation of law involved a crime far different than the ones charged in the indictment.

On redirect it was developed that after the packaging, the strainers, bags, rubber bands and white powder were placed in a plastic bag and kept in Simpson's apartment (281). It was later shown on the examination of DEA Agent Brophy that after a search and seizure of Ms. Simpson's apartment the material was taken by the government and submitted for laboratory analysis. The plastic bag, metal sifters, spoons revealed only traces of cocaine (440). (A 105) There were no traces of heroin found on any of the material taken from Simpson's apartment (417, 418, 438-444). (A 101, 2, 103-109)

It was through Agent Brophy that the government amplified on the similar act testimony of Simpson to the effect that

appellant was in the drug business. Thus Brophy was allowed, without objection, to testify that after appellant was arrested he was taken to the United States Attorney's office and questioned.* Brophy told of advising appellant of his rights, but the jury was not told whether appellant said he understood his rights or for that matter what if any response he made to the so called warnings. The Agent testified that appellant said he hadn't done any heroin in over two years (353). (A 97) The purpose of the admission was clearly to place before the jury the implication appellant had in the past, more than two years ago, been involved in heroin. Appellant would not sign anything without a lawyer present. It is exceedingly difficult to justify the failure of defense counsel to press the court for a hearing as to the admissibility of these post arrest statements. (So too, it is surprising that counsel sought no limiting instruction as to the purport of Simpson's guilty plea or that no objection was raised to the Court explaining 18 USC 3500 to the jury).

What emerges from the transcript taken as a whole is a studied effort on the part of government counsel to demonstrate the criminal character of the appellant, i.e. he was the sort of person who would set up a narcotic mill in October, 1976.

*There were post indictment statements. Appellant was indicted May 5th and arrested May 6th. The statements were clearly inadmissible under U.S. v. Satterfield, 558 F.2d 655 (2nd Cir 1976) discussed below in Point Five.

The testimony of Ms. Simpson had been basically unshaken. That is, either the jury could believe or disbelieve her as to what took place in October 1976. The government though was hampered by the absence of heroin in the laboratory analysis of the utensils she claimed to have used in the heroin milling process. Her credibility also posed a problem for the government. But neither factor presented a "need" as that term is understood when we consider the admissibility of similar acts and whether to permit a frontal attack to show the criminal - narcotic - propensity of a defendant. Much more was yet to come on the issue of "prior similar acts".

The prosecutor, through Agent Brophy, elicited the admission made by the defendant Rose Smith after her arrest (355) (A 98) Her statement was brought out by reading a redacted version of her responses to government counsel. Her written statement supported that of the government witness Simpson that she packaged heroin and just like Simpson, she said: "One of the people didn't pay me for working for that person". (371). (A 99) From the testimony of Simpson it was clear that the person who had not paid the workers was appellant. Redaction hardly insulated appellant from undue prejudice for when the jury considered the testimony of Simpson and heard the state-

ment of Smith it must have clearly appeared that the non payor was appellant. If it were not appellant, then he was denied confrontation by being unable to show that Smith was referring to someone other than himself. As an added blow to the defense, the prosecutor read that portion of the post arrest statement of Smith showing that there had been a prior consistent statement by Smith: "Question by the U.S. Attorney:"

"This is what you told me before?"

"A: Yeah" (372).

The next witness was Warren Sims and he was a key government witness, not because of proper testimony offered by him, but by reason of improper prejudicial testimony. He testified that in 1974 and 1975 he was in the narcotics business with appellant (487). (A 110) Once again "similar acts" was the ground for admission of the evidence. The government in its offer of proof candidly admitted that the proof through Sims related to the narcotic activity of appellant while appellant and Sims were part of the Frank Lucas drug operation (493, see particularly 511). (A 111-112) The problem with this is that in 1975 appellant stood trial for allegedly being a part of the Lucas drug operation and he was acquitted (493-494). Of course, this did not seem to matter much since acquittals are somehow

regarded as mistakes and the government was permitted to elicit testimony about appellant's drug dealings but defense counsel could not develop the acquittal (601).

Sims corroborated the similar act testimony of Simpson as to the criminal activity of appellant in 1974 (500). Sims was also permitted to testify, in anticipation of the testimony of Betty McFarland, that he witnessed appellant in drug dealings with Ms. McFarland in 1974 (504). Sims related appellant's drug dealings with Gwen Owens, a severed defendant, in 1974 (505) Sim's testimony included the year 1975 as well.

The court received exhibit 9A (528) (A 113) purportedly representing a record maintained by Sims of the monies made and disbursed in the course of his drug business with appellant between 1974 - 1975. It represented the narcotics sold, appellant's money, Sim's money and "the other man's money". (529) (A335 a) This was in connection with "the heroin business" he conducted with appellant, all prior to the charge contained in the indictment (529).

By August of 1976 Sims while in custody (he had been arrested in January 1976 (532)) had been cooperating with State authorities and on October 12th, 1976 a tape recording was made, with his consent, by state authorities of conversations

with Ms. Simpson who was then still an unapprehended suspect. The October conversations with Ms. Simpson were received as Exhibits 12 and 13. (549, 551, 558). (A 336, 343) Due objection was made to the admission of these tapes (566-567). The tapes as the court noted, dealt with Simpson's recounting of her problems with appellant, the fact that appellant had not paid her for her mill work and that she had fought with appellant in the street. Were the Simpson statements to Sims (calling from the state prosecutor's office) made in the course and in furtherance of the charged conspiracy? The Court improperly, we suggest, held the statements admissible (575)).

A reading of the tapes, transcripts of which are reproduced in the appendix at A. 336 ff , reflect that rather than being in furtherance of the conspiracy, Simpson's comments to Sims, who was as noted, calling from the special state prosecutor's office, were a narrative of past events of a highly prejudicial nature and should have been inadmissible. In sum then, Sims was utilized not as a witness to the alleged conspiracy as charged from "August 1976...", but to present a clear picture of the criminal - narcotic - propensity of the appellant. He testified to other crimes, corroborated the testimony of other similar act testimony by others and was used to pre-

sent extrinsic proof that appellant since 1974 was in the heroin business. He was also used to place before the jury inadmissible past narrative discussion with Mrs. Simpson.

The government however, was still not through with its onslaught of prior similar act testimony. It called Betty McFarland. From 1973 to 1976 she testified that she was in the narcotic business (739). While Sims portrayed appellant as being in the narcotics business since 1974, McFarland made it one year earlier, 1973. (740). That prior similar act testimony was the sole purpose of her being called was conceded (741-43). Just as with Simpson and Sims, dozens and dozens of pages of direct were devoted to prior similar act testimony showing without question that appellant was the kind of person likely to have committed the crime charged in the indictment. Repeated defense objection was to no avail. The proof was similar so the government argument ran, and the Court of Appeals was liberal in the acceptance of this kind of proof. All that seemed to be needed to insulate appellant from undue prejudice was a meaningless cautionary instruction which matched against the proof went something like this, in effect - just because you have heard proof, seen exhibits demonstrating appellant was a narcotics dealer for years doesn't mean he was one in 1976.

How naive can we be in judging the real effect of such cautionary instructions in the light of a mass of unduly prejudicial proof?

The government rested. (841).

The defense motions under Rule 29 asserted that there was no proof that heroin was involved in the alleged conspiracy. The motions were denied (854).

Appellant offered no substantive evidence, but only asked that a portion of government exhibit 12, already in evidence, be played back (859). Appellant then rested (861).

The proof was concluded at p. 872.

At 892 (A 125) prior to summations, there surfaced the matter of the government's proof possibly being susceptible to felony possession of cocaine as opposed to heroin (893) (A 126). It will be noted that government counsel, who drafted the indictment (his initials appear on the upper left hand corner of the indictment), opened to the jury that the case would involve a conspiracy to possess with intent to distribute and distribution only of heroin (21-24) (A 18-21). However, in a chemical analysis of the material found in Simpson's apartment only traces of cocaine were found (438-44). (A 103-109) Simpson had testified that while the people worked packaging heroin,

there was cocaine around and people used it (198-199). She did not know who brought it or the amount available. There was insufficient evidence to support any charge that cocaine was possessed with intent to distribute. Nonetheless, the prosecutor argued to the Court that a guilty verdict under both counts could still result even were the jury convinced cocaine alone was present (893). The discussion on this key issue appears at pp. 893 to 909. (A 126-142)

The defense contentions covered all bases: (1) Variance (2) Since the indictment charged herein there is no assurance the Grand Jury would have indicted for cocaine in the face of the absence of proof of felony conduct involving cocaine (3) If the indictment could be treated as charging cocaine, instead of heroin, there was insufficiency under Rule 29 for felony possession of cocaine. The only proof as to cocaine was: (1) traces were found on a utensil in Simpson's apartment (2) while cocaine was present in the apartment for use by the workers in the mill Simpson did not know who brought it and whether those who used it were the one's who brought it to her apartment, i.e. whether it was a misdemeanor possession rather than the felony conduct set forth in the indictment.

The important argument is not necessarily one of pre-

judicial surprise or variance, but rather assuming the court could under the indictment charge alternate theories purporting to justify conviction (i.e. felony conduct either as to cocaine or as to heroin) there simply was insufficient proof under Rule 29 to permit sending the case to the jury as to a cocaine charge. And, a general verdict is incurably infected by reason of the inability now to determine on appeal whether the jury found felony cocaine activity as opposed to felony heroin conduct. So too, it is not enough to argue that either theory would be proper for the jury to consider since both are controlled substances. In the absence of a waiver of indictment, a defendant has a right to be tried on an indictment found by the Grand Jury and there is no assurance that if presented with an alternative as to whether to indict for felony cocaine activity the Grand Jury would have done so on the paucity of proof, despite what the petit jury may have been willing to do. This raises not a variance problem under FRCP 7, but rather a 5th Amendment issue (that is, the right to be tried on a charge brought by the Grand Jury).

Nonetheless, the Court ruled:

"I perceive in the law no significant variance between a charge of possession with intent to distribute a narcotic substance which the government identi-

files in the indictment as heroin and proof, if the jury so finds of possession with intent to distribute a narcotic substance which is cocaine" (969) (A 143)

During the government summation, the prosecutor termed the case as one dealing with a "heroin factory operation" (973, 983, 996, 997). (A 114, 146, 147, 148)

Post trial on July 21, 1977 the Court rendered a written opinion setting forth its views (A 9). The ruling was based solely on the matter of variance though counsel had argued all the grounds referred to above.*

That prior similar acts were being used to establish criminal propensity was clear: the acts of 1973, 1974 and 1975 demonstrated he was "... in the heroin business" (974). (A 145)

* Though there was argument about a "variance" what counsel were addressing themselves to was rather an "amendment" to the indictment. See the discussion of the distinction in Watson v. Jago, 558 F.2d 330, 333 ff (6th Cir. 1977).

As to Count One, the defense argument is one of insufficiency under Rule 29 insofar as the Court submitted alternate factual theories supporting a conviction (i.e. conspiracy either as to cocaine or heroin) and with a general verdict there was no way to determine whether the jury erroneously convicted for a conspiracy to distribute cocaine.

As to Count Two, the argument is one of "Amendment" to the indictment as well as insufficiency under Rule 29 to the extent the charge could be threatened as alleging distribution of cocaine.

So too, the prosecutor in summation argued that the post arrest admission of appellant demonstrated that he had been in the narcotic business (1007). (A 149)

The post arrest statement of the co-defendant Smith to the effect that she had not been paid by "someone" in the redacted version was welded together with the testimony of Simpson to establish, as the prosecutor argued, that the non payor, lead of the heroin operation was appellant (1008). (A 150)

What emerges from both the indictment, the government opening and summation was that this was meant to be tried as the conduct of a heroin factory. The Grand Jury apparently so conceived it as did the prosecutor in his opening and closing. Nonetheless, the Court enlarged it to include the possibility that a jury could find guilt under both counts if it found the requisite intent as to cocaine. Without regard to the matter of variance, there was a clear insufficiency hurdle in submitting such a theory to the jury as to cocaine activity. Even with the benefit of the Court pre-summation ruling, the prosecutor could not get himself to argue that what the jury had before it was anything other than a heroin factory operation. (1090). (A 151).

The Court's charge was to the effect that a guilty ver-

dict could result, other factors being present, whether the substance was heroin or cocaine (1145), (A 188) this despite the language of the indictment and the way in which the proof came in. The Court instructed that the finding that the substance "was not heroin but was cocaine, that is of no legal significance" (1145). Due exception was taken (1161). (A 204)

During deliberations the jury expressed concern over the effect of the substance found on the utensils (1175, 1184) (A 218, 227)

After several days deliberations the jury reported itself hung with an 11 to 1 vote (1259). The court did not give a standard modified Allen charge; rather, it more strongly called for a verdict. However, no exception was made to the charge as given. Still the jury could not agree (1268). The jury later called for a re-reading of the substantive count instruction and the court adhered to its ruling that whether heroin or cocaine it was of no legal significance. (1275)

(A 318) After three days deliberation, the jury returned a verdict of guilty on both counts (1284) and appellant was remanded (1292).

ARGUMENT

POINT ONE

THE COURT ERRED IN CHARGING THAT
AS TO BOTH COUNTS, THE JURY COULD
CONVICT IF THEY FOUND THE NARCOTIC
TO BE COCAINE AS OPPOSED TO HEROIN

Despite the length of this record, the proof as it related to the charges contained in the indictment was short and simple. The facts of this case however, were buried under a mass of "other crimes" proof.

The sole substantive witness to what allegedly occurred at 626 Riverside Drive was Ms. Simpson (90-148). She testified to prior heroin packaging work for the appellant in 1975 and 1976 (59, 69-70). There was no question, were her testimony believed, that the October, 1976 milling operation involved solely heroin. During cross examination it developed that during the October work session, some of the defendants sniffed cocaine as they worked (199). But as far as cocaine was concerned, Ms. Simpson did not know who brought it to her apartment, the amount available or if those who used it brought their own supply (198). Six months later when agents searched her apartment, laboratory analysis showed some utensils contained

traces of cocaine (440). Heroin was not found, for by Simpson's own testimony, it had already been distributed. The foregoing constitutes the entire testimony as to cocaine. In essence, it was used by the mill workers as a stimulant to keep them going during the long hours of the milling operation. That the Grand Jury and the prosecution considered the case to be one involving the possession with intent to distribute and the distribution of heroin is crystal clear:

"This case will tell you the story of how these three defendants and others working with them turned heroin into thousands of packages for distribution to people on the street.

** ** **

"That is, they conspired to possess with intent to distribute approximately 2000 glassine envelopes of heroin. That is what the government's proof will show beyond a reasonable doubt".

(Prosecutor's opening, pp. 21-22) (A 18-19)

When Ms. Simpson testified on direct that the substance was heroin that she helped package, such testimony was admitted by reason of her experience with the substance. Though the prosecutor had the benefit of the Court's ruling, prior to summation, that a conviction on each count was possible even if the jury found one of the substances at the apartment to be

cocaine, he still argued to the jury that they were dealing with a heroin factory. (1090) (A 151) The prosecutor of course, knew what had been presented to the Grand Jury - he was the government attorney who presented the case, and it was obvious the Grand Jury intended to indict for violations of law involved in the heroin mill.

There was absolutely no proof of cocaine distribution or possession with intent to distribute that substance. As for cocaine, at most some people at the mill were guilty of misdemeanors by their personal use of the substance.

Assuming arguendo that from the wording of the indictment and its reference in count one only to schedule I and schedule II narcotic drugs, a Court would have been correct in permitting receipt of proof as to cocaine and heroin, was there any proof in this case as to felony cocaine activity to even survive a Rule 29 motion? The firm answer is that, laying aside for the moment the matter of variance, there was a patent deficiency in proof as to felonious conduct with respect to cocaine. That the "workers" at the mill sniffed an undisclosed amount of cocaine with no proof that anyone other than the user brought his own supply is wholly insufficient to fasten felony

liability upon any of the defendants, including the appellant.

The government gains nothing from its reliance below on U.S. v. Ramirez, 482 F.2d 807 (2d Cir. 1973) for there, the proof sufficiently showed distribution or possession with intent to distribute the schedule II narcotic drug, something wholly lacking in the case at bar.

In U.S. v. Davis, 501 F.2d 1344 (9th Cir. 1974) the defendant was indicted for distributing LSD. There was some proof he distributed another substance. The Court of Appeals wrote of the case:

The Court instructed that the essential elements of the offenses charged in Counts I and II were (1) that the substance involved is a controlled substance, (2) that the defendants distributed a controlled substance, and (3) that the defendants did so knowingly and intentionally, and that Count III contained the additional element that the defendants' possession was with the intent to distribute. The court then instructed that LSD and psilocybin are controlled substances and a finding that the substance was either LSD or psilocybin would be enough to satisfy the first element of the offenses. This was error. The Indictment specified that the substance involved was LSD. Davis could be convicted only upon a finding that it was LSD.

Viewing the record, it is clear that the jury was not confused by the instruction. The evidence was that the mushrooms contained LSD. Both the government and Davis conceded that the substance involved was LSD. Psilocybin was interjected only in the context of Davis' knowledge as to what he was selling. The error was harmless.

(underlining added)

In the case at bar, the jury was unclear as to the effect of the different substances and manifested its concern with a note during deliberations (1175, 1184, 1275) (A 218,227,318). So too, unlike Davis, supra counsel did not concede the presence of heroin in any way whatsoever.

U.S. v. Taylor, 464 F.2d 240 (2d Cir. 1971) mandated relief for the defendants as to any charge involving cocaine. Of course the same is not true as to the government's theory of heroin distribution. But, and this is critical, the Court submitted two theories pointing towards conviction, one of which was erroneous (that relating to cocaine) and with a general verdict, the conviction must fall for it has been stated:

When two theories are submitted to a jury, one of which is incorrect, a general verdict of guilty must be reversed even though the jury was instructed upon a correct alternate theory Williams v. North Carolina, 317 US 287 (1942); Stromberg v. California, 283 US 359 (1931).

Beck v. U.S., 298 F.2d 622 631 (9th Cir. 1962)

This rule extends to alternate factual theories as well. Thus the Court in Cramer v. U.S., 325 US 1 at 36 fn. 45 (1945) held:

"The verdict in this case was a general one of guilty, without special findings as to the acts on which it rests. Since it is not

possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient."

While there was much discussion among counsel with respect to the issue of prejudicial surprise resulting from a "variance" and the difficulty of having to respond to a new theory of liability at a time when the trial was all but over, the decision of the Court in this case deprived appellant of a more fundamental protection which the Grand Jury was designed to provide*, that is:

"to limit (a criminal defendant's) jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge"

Stirone v. U.S., 361 US at 218.

The Supreme Court in that case reiterated what had been established long before: that this protection is lost if the court is free to change the charging part of an indictment "to suit its own notions of what ought to have been or what the grand jury would probably have made it if their attention had been called to suggested changes..."Id. at 216. Cf. Russell v.

* This involved an "amendment" to the indictment, not a "variance". Watson v. Jago, 558 F.2d 330, 333 ff. (6th Cir. 1977). See our footnote at page 17. See Also U.S. v. Prejean, 494 F.2d 495, 497, 5th Cir. 1974.

U.S., 369 US 749, 770-71 (1962); U.S. v. Agone, 302 FS 1258 (SDNY, 1969).

This is particularly relevant to the second count as well where apparently, the grand jury heard all the testimony, both as to cocaine sniffing as well as heroin and nonetheless, rejected a charge of felonious possession of cocaine.

The court below erred in submitting as an alternate theory on both counts the possibility that the jury could convict if the substance were found to be cocaine. There was simply no proof of felony conduct as to cocaine. At best, some people possessed it for their own personal use. The testimony of the government's witness to the milling operation as well as the testimony of others, such as McFarland was to the effect that appellant was allegedly involved in the distribution of heroin. Considering the nature of the Court's instructions and the fact that Simpson had testified to personal cocaine use at the apartment and the fact that six months later a laboratory analysis of some utensil in her apartment showed traces of cocaine, this might well have mistakenly led the jury to find guilt under both counts of the indictment insofar as cocaine was concerned, when the proof was insufficient as a matter of law under Rule 29 so as to even warrant sending the case to the jury on such a

theory in the first place.

Submission of the alternate theory as to cocaine violated appellant's fifth amendment right to be tried on an indictment as returned by a Grand Jury. The theory as to cocaine could not survive the Rule 29 motion*.

POINT TWO

THE COURT ERRED IN PERMITTING THE
TAPED CONVERSATIONS OF THE WITNESSES
SIMPSON AND SIMS TO BE ADMITTED IN
EVIDENCE

Ms. Simpson, was a co-defendant who had pleaded guilty prior to trial. Her statements made in the course of the conspiracy and in furtherance thereof were properly admissible (Rule 801 (d) 2E). But it is a mistake to assume that simply because one is a co-conspirator, as Simpson clearly was in August and October, 1976, all her statements made during that period were admissible against appellant.

* As to Count One, the defense argument is one of insufficiency under Rule 29 insofar as the Court submitted alternate factual theories supporting a conviction (i.e. conspiracy either as to cocaine or heroin) and with a general verdict there was no way to determine whether the jury erroneously convicted for a conspiracy to distribute cocaine.

As to Count Two, the argument is one of "Amendment" to the indictment as well as insufficiency under Rule 29 to the extent the charge could be treated as alleging distribution of cocaine.

Since as far back as January of 1976 Warren Sims (who was neither a defendant nor a co-conspirator) had been cooperating with state authorities.

On October 12, 1976 and October 14, 1976 he made recorded conversations with Simpson, (549, 551, 558, 556-7, 575) (A 114,115,121-3,124) By October 12, 1976 Ms. Simpson had, according to her testimony, already worked at the mill in her apartment for the appellant and gotten into an argument with him in the street over the payment for her work. By October 12, 1976 she was at odds with appellant. Government Exhibit 12, admitted over defense objection, revealed that in Simpson's conversation with Sims she told of her fight with appellant on the street, the fact that he had only paid her a few hundred dollars for the use made of her and her apartment and the tape spelled out that "stuff" had been kept in the apartment. The tape was highly incriminatory of the appellant. Government Exhibit 13 recorded by Sims on October 14, 1976 also deeply incriminated appellant in the drug business. Simpson and Sims spoke of the quantity that had been packaged and the thrust of the conversation was to the effect that Simpson felt appellant had cheated her in paying her so little for the work she had done and they discussed the use which had been made of her apart-

ment. As earlier noted, Sims had recorded the conversations from his place at the Special State Narcotic prosecutor's office. During deliberations the jury was concerned about the admissibility of such tapes (1240) (A 283) Were these incriminatory conversations between Sims and Simpson admissible as against appellant?

The short answer is that the tapes were clearly not admissible. Present Rule 801 still bases admission of such testimony on an agency theory within the boundaries set forth in Krulewitch v. U.S., 336 US 440, 443 (1949) and Lutwak v. U.S., 344 US 604, 617 (1952).

The statements of Simpson to Sims were merely a narrative declaration of past facts and thus, inadmissible under the rule of U.S. v. Goodman, 129 F.2d 1009, 1013 (2d Cir. 1942). The statements appear to be no more than Simpson recounting her past difficulties and activities with appellant. Even if this were a statement of a co-conspirator to another co-conspirator it would be inadmissible as not in furtherance of the ends of the conspiracy. Even mere conversations between co-conspirators is not enough to make it competent. The rationale for admission is (as U.S. v. Birnbaum, 387 F.2d 490 (2d Cir. 1967) tells us and as the Rule of Evidence suggests) one of agency, that is

"because they are part of the execution of the plan and have been impliedly authorized by others". Simpson's accusations and complaints made to Sims can hardly be said to have been authorized expressly or impliedly by appellant. It could not be seriously argued that he would want others to know he had cheated "workers" by not paying them a fair price or that he physically struck Simpson.

The taped conversations fully recounted appellant's alleged incriminatory conduct, they were clearly inadmissible and took on added importance to the jury as we learn from the jury note sent out during deliberations (1240). The tapes should not have been admitted. Their admission substantially prejudiced appellant's right to a fair trial.

POINT THREE

THE COURT ERRED IN ADMITTING
THE POST ARREST STATEMENT OF
SMITH

Rose Smith was a co-defendant who made a post arrest statement (355) (A 98) The statement supported the witness Simpson that work had been done for a "person" and that "person" had not paid the people". (371) (A 99) This was the way the jury heard the redacted version of the statement. Of

course, the "person" was allegedly the appellant and the issue is whether, considering the principles set forth in U.S. v. Wingate, 520 F.2d 309 (2d Cir. 1975), the court despite redaction, erred in admitting the testimony.

The issues are: (1) whether the post arrest statement is clearly inculpatory as to the appellant and (2) if it is vitally important to the government's case are cautionary instructions insufficient to insulate a defendant from prejudice resulting from the denial of confrontation?

Taken alone, the government could safely argue that the statement was neither clearly inculpatory nor vitally important to its case. But, in the context of the case, with the erroneous admission of the taped conversations between Simpson and Warren Sims (Exhibits 12 and 13) to the effect that the "person" employing everyone was the appellant and that he had cheated all the workers by not adequately paying them, there can be little doubt that despite redaction the "person" referred to in the Smith post arrest statement was taken by the jury to mean the appellant. And, the prosecutor so argued to the jury (1008). (A 151)

In Wingate, the Court held that redaction insulated the defendant therein since other testimony did not make

it clear that the "someone" was the defendant. In addition, the jury had before it directly inculpatory taped testimony of the defendant Wingate in which he discussed his drug problems and plans with his confederates. This "amounted to a confession by Wingate" and in the setting of that case, the post arrest statement was not deemed to be "powerfully incriminating". This is not the situation in the case at bar. Aside from the testimony of Simpson, the trial dealt with other crimes testimony. A search of the apartment of Simpson by DEA agents did not corroborate her testimony of heroin dealing there. There was no taped conversations with appellant supporting Simpson's tale. However, the combination of Simpson's proper trial testimony that she had gotten into a dispute with appellant and that he had not paid the workers for their efforts at the apartment, when combined with the improper receipt of the taped conversations between Simpson and Sims and the post arrest, though redacted, statement of Smith made that statement of Smith powerfully incriminating insofar as the appellant was concerned. Unlike U.S. ex rel. Nelson v. Follette, 430 F.2d 1055 (2d Cir. 1970) cert. denied, 401 US 917, the post arrest statement of Smith served to clearly connect appellant to the crime and buttressed the already inadmissible tape recorded statements made by

Simpson to Sims.

In the setting of this case, the post arrest statement of the co-defendant Smith denied appellant of his constitutional right of confrontation.

POINT FOUR

THE SUPER ABUNDANCE OF OTHER
CRIMES PROOF DEPRIVED APPEL-
LANT OF A FAIR TRIAL

"During the past few decades, the exceptions allowing admission of proof of prior criminal acts have grown in number to the point that they have engulfed the rule. Despite the efforts of defense lawyers to stem the tide, the flow has been constant", so opined this Court in U.S. v. Papadaxis, 510 F.2d 287 (2d Cir. 1975).

But does this mean that the talisman to admission of such prejudicial testimony is that the other crimes be "similar"? Are there no limitations? Are there still instances when from the quantum of other crimes proof a reviewing court can safely determine that the purpose and effect of admission was solely to prove criminal character? It is quite true that at the trial level there is the constant struggle between the defense bar to keep out such proof and prosecutors who, recognizing the natural

effect on the jury to treat such proof as indicative of criminal propensity, press a supposed purpose other than criminal character as the reason for admission.

The trial practice is now - if the crime be "similar" - it will go into evidence. Though this Circuit acknowledges that reception to prove criminal character is not permitted, recent memory fails to reveal in any narcotic case instances where this court has labeled the purpose of the prosecutor as one to prove criminal character. Rather than stating that the exceptions have engulfed the rule, it is better to recognize that the matter of "other crimes" has gotten completely out of hand. Trial Judges, relying on the liberal attitude of this Court, hardly ever keep out such proof even though the clear effect is to demonstrate criminal propensity. The case at bar is a perfect example where the matter of "other crimes" truly engulfed the crime set forth in the indictment. Well over half, if not two thirds of the trial transcript dealt with proof of other crimes, this with oral testimony as well as written evidence thereof.

As despicable narcotic violations may be, it is a kind of crime that generally does not raise a need to prove intent. U.S. v. Goodwin, 492 F.2d 1141 (2d Cir. 1974). There seldom is

(4)

substantial need for the probative value of the evidence provided for by the prior crimes. In U.S. v. Keilly, 445 F.2d 1285 (2d Cir. 1971) the need appeared on the government's rebuttal case. See U.S. v. Leonard, 524 F.2d 1076, 1092 (2d Cir. 1976). In U.S. v. Deaton, 381 F.2d 114, 117 (2d Cir. 1967) there was need to prove fraudulent intent. What was the need in the case at bar? It was simply stated, to show that appellant was an alleged drug dealer and being in the drug business it was to be expected that he would run a mill operation. Is this not proof of his criminal character? Does this not show he is a "bad" man with a propensity for the crime charged?

In seeking admission of the wealth of other crimes proof the prosecutor of course, avoided such a claim. But he repeatedly slipped during the trial to the extent that we can on a review of the record say that his purpose was to demonstrate the criminal character of the appellant. The "other crimes" demonstrated that appellant was a drug dealer. First, the testimony of Warren Sims was received not to prove any matter relating to the crime charged. He was not a co-conspirator. He had been in custody since well before the commencement of the conspiracy. Why was he permitted to testify? The answer is clear: he was to prove to the jury that appellant since 1974

was in the drug business. This was his testimony (487).

(A) Though outside the conspiracy charged, the Court received Government Exhibit 9A which was a record maintained by Sims of the money he, appellant and another person made in the "drug business" in 1974-1975. Appellant was said to be in "the heroin business" (529) (A) With Sims we deal with someone who is not necessary to show the development of the conspiracy charged or the relationship of the alleged conspirators; rather, we meet head on the issue of whether criminal character proof ought to have been received in the setting of this case. Recall that the prosecutor elicited from the arresting agent that the appellant supposedly said post arrest, that he had not been in the drug business in the last two years - this implying that appellant had been in the business at sometime. During summation, the prosecutor left no doubt that his purpose was to prove that for a time well before the conspiracy alleged in the indictment the appellant had been in the drug business (1007-8).

(A 149-40)

There are different ways that "other crimes" may be developed: (1) If in the course of committing the crime charged, as part of the res gestae, another crime is discussed or committed. (2) If it is truly necessary to show the relationship

between the conspirators and the court permits the conspirator to testify as to the whole of the relationship. (3) A need may become apparent from the proof offered by the defense.

I suggest that the clearest indicator of the prosecutor's intention to prove criminal propensity is when he calls someone not a witness to the crime charged and is permitted to develop proof that the appellant's business is that of committing crimes of the sort charged and the court receives extrinsic documentary proof of the past criminal conduct (Exhibit 9A). With the testimony of Sims and Exhibit 9A, the testimony of the arresting agent as to appellant's purported post arrest statement and the testimony of McFarland the record was crystal clear that appellant was shown to be the kind of person likely to have committed the crime charged. By no means do we intend an attack on the receipt of "other crimes" in all cases. However, we suggest that in the setting of this case, with a fairly simple factual picture as testified to by Ms. Simpson there was no need to bury the averments in the indictment under a mass of inherently prejudicial proof.

But to those experienced in the ways of prosecutors, there appears to have been a "need" though not one justified under law. The Government's case rested to a large extent on

the believability of Ms. Simpson. No heroin was found. And while there was an absence of solid corroboration it may well have dawned on the prosecutor that by offering a mass of "other crimes" proof he could lift his case to a point beyond a reasonable doubt. While this court has repeatedly stated that it adheres to the inclusory rule with respect to "other crimes" proof, it certainly can not be the law that whenever a prosecutor feels that his case is weak - the case as set forth in the indictment - he may justifiably resort to the benefit of the prejudice inherent in other crimes proof. The case at bar is a perfect example of prosecutorial overkill. When the proof was in the prosecutor could argue, as he did in summation, that appellant had been shown by Sims to be a drug dealer, and this as far back as 1974. Such a strategy while best designed to win the case and lead the jury to believe appellant was the kind of person likely to have committed the crime charged, does not comport with the essentials of a fair trial.

If this Court concludes that "other crimes" evidence should have been excluded the error was not harmless beyond a reasonable doubt. Excluding evidence that ought to have been inadmissible this was not a case with properly admitted over-

whelming evidence. To be sure even with all that occurred, the jury first announced it was hung and it took an Allen charge before a verdict was returned.

POINT FIVE

THE GOVERNMENT FAILED TO SUSTAIN
ITS BURDEN OF PROOF AS TO THE AD-
MISSIBILITY OF THE APPELLANT'S POST
INDICTMENT STATEMENTS AND IT WAS ERROR
TO RECEIVE THEM IN EVIDENCE

Following the appellant's indictment, he was arrested and after his booking, he was taken to the office of the United States Attorney. Ostensibly the reason was to secure information for bail purposes. The real reason was to gather additional evidence against him. Thus, to support the position that he had been in the narcotic business, the government secured an admission that for the past two years he "hadn't done any heroin". (353) (A97). Also to identify appellant as the person referred to on the Sims - Simpson tapes the prosecutor obtained the admission that he appellant was known by the name of "Glenn" (351) (A 96). In summation the prosecutor made use of these admissions (1006-1007) (A 148a-149)

We are here concerned with a post indictment statement.

Agent Brophy testified that he had read the appellant his Miranda rights, that the appellant made the admission

earlier referred to and that until he obtained the services of an attorney he would not sign anything. (348-353) (A 96a-97)

There was no pretrial motion to suppress or any defense motion questioning the admissibility of the statements. Two questions arise: (1) Did the appellant waive his right to contest admission of his post indictment statements on the basis of the fifth and sixth amendments and (2) Did the government sustain its burden of proof warranting submission of the statements to the jury? We submit the answers to both questions are in the negative.

The docket entries reflect that an indictment was returned on May 5, 1977 and ordered sealed. Appellant was arrested on the warrant on May 6, 1977. The testimony shows that post indictment he was read his Miranda rights, but there is no indication of his responses thereto except for a claimed admission of narcotic dealing and the use of an alias. He would not sign anything without counsel being present.

Before such a post indictment statement is admissible the government must carry its "'heavy burden'" of demonstrating that appellant waived not only his right against self incrimination but his right to counsel as well. U.S. v. Cheung Kin Ping, 555 F.2d 1069 (2d Cir. 1977).

U.S. v. Satterfield, 558 F.2d 655 (2d Cir. 1976) is directly on point as to the rights involved in a post indictment interrogation. Clearly the record fails to demonstrate as a matter of law warranting submission to the jury that the government showed appellant "knowingly and intelligently" waived his sixth amendment rights. Johnson v. Zerbst, 304 U.S. 458, 464-465 (1938).

Assuming the statements could properly have been suppressed, how do we deal with the failure to object to the admission thereof? The rule as to what constitutes ineffective assistance of counsel in this Circuit is severe. Rickenbacker v. Warden, 550 F.2d 62 (2d Cir. 1976). And, though this principle immediately comes to mind it is doubtful appellant can find relief by pressing it.

We deal however with the surrender of two constitutional rights, i.e. self incrimination and the right to counsel. Certainly as to both the government must shoulder an exceedingly heavy burden. There must be proof that the appellant knowingly and intelligently waived his rights or that the failure to assert the rights was strategic. Henry v. Mississippi, 379 U.S. 443 (1964). Perhaps in fairness as to the issue of waiver there ought to be a remand. The error in the admission of such incriminatory statements was not harmless. The statement

as to being "in heroin" was utilized by the prosecutor to support his theory that appellant was a drug dealer and thus the kind of person likely to commit crimes of the sort charged.

CONCLUSION

The judgment of conviction should be reversed.

Respectfully submitted:

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